WONG NGOO HING & ANOR *a*

v.

WONG CHOY

HIGH COURT MALAYA, TEMERLOH *b*
HISHAMUDIN YUNUS J
[CIVIL APPEAL NO: 11-28-98]
13 SEPTEMBER 1999

DAMAGES: *Fatal accident - Dependency claim - Deceased killed in road accident - Funeral expenses paid by children - Whether widow entitled to claim against defendant when such expenses were not paid by her - Civil Law Act 1956, s. 7(3)(ii)* *c*

This was the defendant's appeal against the decision of the magistrate on both liability and quantum in a running down action. The magistrate had found the defendant driver of a lorry liable for the accident which caused the death of the deceased motorcyclist. No contributory negligence was attached against the deceased. *d*

On damages, the magistrate allowed the plaintiff/widow's claim for funeral expenses although such expenses were paid, not by her, but by her children. The issue in this appeal was whether the plaintiff/widow was entitled to claim against the defendant for the funeral expenses. *e*

Held:

[1] The magistrate was correct in his finding that from the evidence there was no contributory negligence on the part of the deceased. Hence the appeal against liability was dismissed. *f*

[2] The plaintiff/widow was not entitled to claim for the funeral expenses as they were not incurred by her but were wholly paid for by her children. *g*

[3] A plaintiff can claim for funeral expenses, even though such expenses are wholly paid for by friends or relatives, if there is evidence that the plaintiff has given an undertaking to such friends or relatives or, at least, to the trial court itself that she will repay such friends or relatives if she succeeds in the claim for such expenses. *h*

i

[4] Here, as there was no evidence of such an undertaking given by the plaintiff, the order of the magistrate in respect of the funeral expenses was set aside.

[Appeal against liability dismissed; appeal against award for funeral expenses allowed.]

Case(s) referred to:
Schnieder v. Eisovitch [1960] 2 WLR 169 ***(refd)***
Tan Ah Hong v. Mahalingam [1962] 28 MLJ 250 ***(dist)***

Legislation referred to:
Civil Law Act 1956, s. 7(3)(ii)

For the appellants - Pn Rajeswary; M/s Thomas, Bala & Assoc
For the respondent - Patwant Singh; M/s PS Sohanpal & Sidhu

Reported by VT Singam

JUDGMENT

Hishamudin Yunus J:

This is an appeal against the decision of the learned magistrate sitting at Bentong. He had given a decision in favour of the respondent/plaintiff in a running down case.

It is a dependency claim by the widow (the respondent/plaintiff) of a motorcyclist who died in a road accident caused by a collision between his motorcycle and a lorry driven by the first appellant/first defendant and owned by the second appellant/second defendant at the material time.

The appellants are appealing against both liability and quantum.

As to the appeal against liability, it is only in respect of the finding of the learned magistrate that there was no contributory negligence on the part of the deceased motorcyclist. I find no difficulty in holding that there is no substance at all in this appeal against liability. In my judgment, the learned magistrate was correct in his finding. For, it is clear from the evidence that there is no contributory negligence on the part of the deceased motorcyclist. Hence the appeal against liability is dismissed.

I shall now turn to the appeal against quantum, which I think raises an interesting point of law. The issue posed by this appeal against quantum is whether the respondent/plaintiff is entitled to claim against the respondents funeral expenses when such expenses had been paid, not by her, but by her children.

Before the lower court, she had claimed such funeral expenses pursuant to s. 7(3)(ii) of the Civil Law Act 1956, which provides:

> (3) The damages which the party who shall be liable under subsection (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under subsection (1);
>
> Provided that:
>
> (i) ...;
>
> (ii) damages may be awarded in respect of the funeral expenses of the person deceased if such expenses have been incurred by the party for whose benefit the action is brought.

The claim for funeral expenses was allowed by the learned magistrate.

Before me now, it is argued by the learned counsel for the appellants that such a claim should not have been allowed as the funeral expenses were paid by the children of the respondent and not by the respondent herself.

The learned counsel for the respondent, on the other hand, submitted that the respondent was entitled to claim the funeral expenses regardless who paid for such expenses. He relied on the case of *Tan Ah Hong v. Mahalingam* [1962] 28 MLJ 250.

In *Tan Ah Hong*, which was also a running down case, Suffian J (as he then was), citing *Schnieder v. Eisovitch* [1960] 2 WLR 169, held that the plaintiff, in the case before him, was entitled to claim for funeral expenses even though the funeral expenses were paid for, not by her, but voluntarily by friends and relatives. I shall set out the relevant passage of the judgment:

> As to special damages, first, the plaintiff claims $750, being expenses incurred on the funeral expenses of the deceased. I find that $750 was spent on the funeral but they were incurred not by the plaintiff but voluntarily by friends and relatives who rallied around. She never asked for the loan of this monies, nor have the friends and relatives ever asked for repayment, though some of them have mentioned the amount they spent, probably in the hope of being repaid, knowing that the plaintiff was launching this claim against the defendant. The plaintiff feels that she is under a moral obligation to repay these sums and would repay if she received any money. Mr. Khoo for the defendant argues that as the expenses has not actually been incurred by the plaintiff who is only under a moral obligation to repay, she is not entitled to it.

There is a description of special damages by Bowen L.J., in *Ratcliffe v. Evans* and also a definition by Earl Jowitt in his *Dictionary of English Law* at page 1659. Neither the description nor the definition helps much in deciding whether or not Mr Khoo is right, as it speaks of loss incurred, but does not say incurred by whom.

In *Schneider v. Eisovitch* Paull J said:

> In my judgment, strict liability is not the be-all and end-all of all a tortfeasor's liability. A plaintiff cannot claim a sum of money because he would like to pay a friend for his services. That would alter the character of the services given. The services must be treated as friendly services given freely by a friend. But to pay out-of-pocket expenses in respect of necessary services freely given does not alter the character of the services. I do not think the test is whether there is a moral duty to pay. Before such a sum can be recovered the plaintiff must show first that the services rendered were reasonably necessary as a consequence of the tortfeasor's tort; secondly, that the out-of-pocket expenses of the friend or friends who rendered these services are reasonable, bearing in mind all the circumstances including whether expenses would have been incurred had the friend or friends not assisted, and thirdly, that the plaintiff undertakes to pay the sum awarded to the friend or friends.
>
> Here I find that the services rendered by the plaintiff's friends and relatives were reasonably necessary as a consequence of the defendant's tort; secondly that the out-of-pocket expenses of the friends and relatives who rendered these services were reasonable, and not excessive, bearing in mind the importance which is attached by the Chinese to a proper funeral. As regards the third condition mentioned by Paull J, there is no evidence that the plaintiff has given an undertaking to her friends and relatives that she would repay them, but from the facts of that case it appears that no such undertaking need be given by her, it being sufficient if she gives an undertaking to the court that she would repay them if I allow the expenses. She gave such an undertaking (she said in re-examination, "I shall pay them if I get any money") and I accordingly allow her the $750, but this is to be reduced to $375 as the deceased was equally to blame for his death.

In the present case, it is my judgment that the plaintiff is not entitled to claim for the funeral expenses. This is because the funeral expenses were not incurred by her. They were not incurred by her because such expenses were not paid by her but were wholly paid for by her children.

Tan Ah Hong can be distinguished because, in **that** case, although, like the present case, the funeral expenses were not paid for by the plaintiff but were paid for by friends and relatives, there was, however, evidence of an undertaking given by the plaintiff to the court that she would repay them (*ie*, relatives and friends) if she were to succeed in her claim for such expenses. It was because of this undertaking that Suffian J allowed the claim by the plaintiff in that case for funeral expenses.

Among the principles that can be abstracted from the judgment in *Tan Ah Hong* pertaining to a claim for funeral expenses are these. As a general rule, a plaintiff in a dependency claim (in a fatal accident claim) cannot claim for funeral expenses unless such expenses were actually incurred by the plaintiff. However, a plaintiff can claim for funeral expenses, even though such expenses were wholly paid for by friends or relatives, if there is evidence before the trial court that the plaintiff has given an undertaking to the friends or relatives or, at least, to the trial court itself that he will repay the friends or relatives if he were to succeed in the claim for such expenses.

In the case now before me, there is no evidence whatsoever of such an undertaking given by the plaintiff.

Accordingly, I allow the appeal against the order of the learned magistrate in respect of funeral expenses. The order of the learned magistrate in respect of funeral expenses is set aside.

a

b

This page is intentionally left blank

c

d

e

f

g

h

i